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BRIEF FOR RESPONDENT

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted]203

ROBERT A. MOSES AND RICHARD P. MOSES, EXECUTORS OF THE ESTATE OF MRS. MIRIAM B. MOSES, DECEASED,

PETITIONERS

versus

THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 85 L. Ed. 147, 61 S. Ct. 189.

Neely v. Eby Construction Co., 386 U. S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072.

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OCTOBER TERM, 1969

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PETITIONERS

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THE MANUFACTURERS LIFE INSURANCE COMPANY,

RESPONDENT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

The Respondent hereby opposes the Petitioners Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered herein March 10, 1969.

QUESTIONS PRESENTED

The Respondent does not agree that the questions herein presented raise any constitutional question or issue and that the questions presented are simply as follows:

1. Was there any substantial evidence upon which the jury could properly find a verdict for the Petitioners?

2. Did the Honorable United States District Court

commit prejudicial error in the exclusion of evidence and the refusal of requested instructions?

STATEMENT OF THE CASE

On December 12, 1949, Mrs. Miriam B. Moses was issued a contract by the Respondent called a Guaranteed Retirement Pension Plan (Trial Ex. 1) for an annual premium of One Thousand Fourteen and 90/100 ($1,014.90) Dollars whereby basically it agreed to pay to her Fifty ($50.00) Dollars per month beginning December 12, 1960, for ten (10) years and thereafter until her death; that in the event of her death prior to maturity it would pay the greater of the sum of the premiums or the stated cash value of Eleven Thousand Six Hundred Ninety-five ($11,695.00) Dollars to her named beneficiary or to her Executors, as may be applicable. On the last page or cover of the contract, there appears the notice shown in Petitioners' Appendix at page 39.

By agreement between Mrs. Moses and the Respondent, the contract was extended for five years from its initial maturity date upon the payment of the same annual premium, thereby increasing the agreed monthly sum to be paid to Eighty Seven and 63/100 ($87.63) Dollars and the cash value upon maturity, to the sum of Eighteen Thousand Four Hundred Ten ($18,410.00) Dollars. The maturity date was extended to December 12, 1965.

On August 23, 1965, Mrs. Moses wrote the Respondent for information in connection with her contract which was to mature December 12, 1965, (Trial Ex. 2c). Thereafter, there was considerable correspondence between Mrs. Moses and the Respondent (Trial Ex. 2C through 2J). As a result of this correspondence, Mrs. Moses executed and mailed to the Respondent her option selection

and waiver of surplus interest form filled out in her own handwriting. (Trial Ex. 2K and 2L)

As a result of the correspondence referred to above, Mrs. Moses selected an option to receive payments under her contract in the sum of One Hundred Four and 94 100 ($104.94) Dollars payable monthly unguaranteed and to terminate at the time of her death (Trial Ex. 2K and 2L).

The contract matured December 12, 1965, and thereafter checks were forwarded to Mrs. Moses monthly in the amount of One Hundred Four and 94 100 ($104.94) Dollars commencing December 12, 1965, and continuing through June 12, 1966, the time of Mrs. Moses' death. All of these checks were accepted and cashed by her except two of the same which were cashed by her Executors following her death.

The issues were tried before the Honorable Donald Russell in the United States District Court for South Carolina, Columbia Division. The Respondent moved for a directed verdict which motion was denied and the issues submitted to the jury which returned a verdict in Plaintiff's favor. The Respondent then moved for judgment non obstante verdicto, which motion was granted by Order of the United States District Judge filed April 30, 1968, (27a). On Appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the Order of the District Judge was affirmed March 10, 1969, (38a).

ARGUMENT

The Petitioners apparently contend that the Order granting judgment n.o.v. in itself deprived the Petitioners of the constitutional guarantee of trial by jury in violation of the Seventh Amendment to the Constitution of the United States. It is well settled, however, that the grant-

ing of a judgment n.o.v. does not, of itself violate the guarantee of a jury trial. *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 85 L. Ed. 147, 61 S. Ct. 189. *Neely v. Eby Construction Co.,* 386 U. S. 317, 18 L. Ed. 2d 75, 87 S. Ct. 1072; and *Manaia v. Potomac Elec. Power Co.,* C.A. Md. 1959, 268 F. 2d 793, (4th Cir.), certiorari denied 80 S. Ct. 255, 361 U. S. 913, 4 L. Ed. 2d 183.

Therefore, it appears to the Respondent that there is no constitutional question involved and that the only issues presented by the Petitioners to this Court are those hereinabove set forth. The evidence before the Court was objectively considered by the District Court in the light most favorably to the position of the Petitioners. The District Judge in his Order (27a) stated, "Following denial of its motion for a directed verdict and a jury verdict in plaintiff's favor, the defendant has renewed its motion for judgment n.o.v. In considering such motion for judgment in accordance with the defendant's prior motion for direction of verdict, all issues of fact, as well as inferences therefrom, are to be viewed in a light most favorable to the position of the plaintiffs."

Not only was this evidence reviewed objectively but sympathetically as the District Judge also in his Order stated, "Sympathetic as I may be with the plaintiffs, I am of the opinion that the motion of the defendant should be granted."

The District Judge in his Order fully and completely examined and discussed all of the evidence presented on behalf of the petitioners and also the evidence which was ruled inadmissible during the trial.

On Appeal to the United States Court of Appeals for the Fourth Circuit, all of the evidence and the rulings of

the District Judge were carefully re-examined and his Order affirmed. (38a).

The Petitioners' position is similar to that discussed by the Circuit Court of Appeals for the Fourth Circuit in the case of Manaia v. Potomac Elec. Power Co., Supra, in which the Court says:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as unecessary to to vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.
>
> "Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and

conscientious and objective in its exercise. Citing Burcham v. J. P. Stevens & Co., 4 Cir., 209 F. 2d 35, he approached the problem 'in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts,' as do we. (163 F. Supp. 672). Even the plaintiffs describe his approach as 'fairminded.' The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

In discussing a similar situation in the case of Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921, Mr. Justice Frankfurter had this to say:

"What are the questions which petitioner here presses upon us? The petition for certiorari sets forth as the questions presented: (1) was petitioner deprived of her contsitutional right to a jury trial guaranteed by the Seventh Amendment? (2) did the Court of Appeals refuse to follow North Dakota law as it was required to do under Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487? If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an ap-

praisal of the fair inferences to be drawn from the evidence.' Chief Judge Magruder has expressed the common sense of the matter:

'If an appellate court is of the view that the trial court made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal (by a Court of Appeals) is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment.'"

In further discussing the propriety of granting Writs of Certiorari on solely evidentiary issues Justice Frankfurter in the same opinion had this to say:

"However, if we are to review facts, we must establish and adhere to a rational standard of review. In so doing we cannot ignore the relevance to this task of the many expressions of the impropriety of such review. If it is unwise for this Court to grant review of cases turning solely on question of fact, how much less wise to undertake to reassess the record in disregard of the reasoned assessment of the evidence by the Court of Appeals.

'The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

'This is not the place to review a conflict of evi-

dence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way.'

"It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury."

The Petitioners base their appeal for this Writ solely on the contention that both the District Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision. This is in no way substantiated by the record herein or in the Petitioners' argument.

The evidence consisted principally of written communication between Petitioners' decedent and the Respondent all of which was presented to the Trial Court and carefully considered by both it and the Circuit Court of Appeals. As stated in the Order of the District Court (27a) the evidence and all inferences therefrom were considered in the light most favorable to the Petitioners. The accepted and usual course of proceedings was followed throughout the trial in the District Court and the appeal to the United States Circuit Court of Appeals for the Fourth Circuit.

CONCLUSION

For the reasons hereinabove set forth, it is respectfully submitted that the Petition for the Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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